Khee San Bhd & Ors v Tunai Impian Enterprise Sdn Bhd & Ors

HIGH COURT (KUALA LUMPUR) — ORIGINATING SUMMONS NO WA-24NCC-1067–12 OF 2022
LEONG WAI HONG J
10 APRIL 2025

Companies and Corporations — Scheme of arrangement — Scheme sanctioned by court — Application to set aside scheme of arrangement that had been approved by court — Whether court could set aside earlier court order which had approved scheme of arrangement under s 366(3) and (4) of the Companies Act 2016 ('the CA 2016') — Whether scheme creditor could set aside court order — Whether scheme creditor could rely on s 369D of the CA 2016 to set aside court order — Whether scheme creditor having voted for scheme and failing to disclose secret deal was estopped from setting aside scheme

The first proposed intervener ie Tunai Impian Enterprise Sdn Bhd ('Tunai') had filed a claim against the second applicant ie Khee San Food Industries Sdn Bhd ('KSFI') for a sum of RM18,665,891.63 premised on a breach of a moneylending agreement. The suit was settled by a consent order. At a later date, an interim judicial manager ('IJM') was appointed over KSFI. The appointment of the IJM had triggered the application of PN17 over its holding company, the first applicant ie Khee San Bhd ('KSB'). To resolve the PN17 status as well as its obligations to creditors of the group, KSB and its subsidiaries proposed a scheme of arrangement under s 366 of the Companies Act 2016 ('the CA 2016'). This scheme of arrangement did not materialise and hence a second scheme of arrangement was then proposed ('KBS schemes'). The KBS schemes consisted of five different schemes ie schemes A to E which were inter-conditional upon each other. Under Scheme E, Tunai as the only creditor had voted for it. The KSB schemes had been approved by the court under s 366(3) and (4) of the CA 2016 ('the sanction order'). Subsequently, Tunai applied to set aside Scheme E contending that there was a failure of consideration arising from an alleged promise allegedly made on behalf of the KSFI to honour the consent order if Tunai voted in favour of Scheme E ('the secret deal'). Tunai also contended that the execution of Scheme E would be in contravention of reg 10 of the Moneylenders (Control and Licensing) Regulations 2003 rendering Scheme E void and/or illegal pursuant to s 24 of the Contracts Act 1950. The issues for consideration were: (a) whether the court could set aside an earlier court order which had approved a scheme of arrangement under s 366(3) and (4) of the CA 2016; (b) whether Tunai could set aside the court order; (c) whether Tunai could rely on s 369D of the CA 2016 to set aside the court order; and (d) whether Tunai having voted for

Scheme E and failing to disclose the secret deal was estopped from setting aside Scheme E. A

Held, dismissing the application:

(1) The court had no power expressly granted to it under s 366 of the CA 2016 to amend or add any new terms to a scheme of arrangement that had been approved by the court under s 366(3) and (4) of the CA 2016 ('approved scheme'). Likewise, there should be no implied power under common law or the Rules of Court 2012 to amend or add any new terms to an approved scheme. Further, an approved scheme must have finality. Scheme creditors like trade creditors and financial institutions must be able to act on the terms of an approved scheme without fear that the terms may be varied or altered subsequently by the court. The court had a limited role after approving a scheme of arrangement under s 366(3) and (4) of the CA 2016. This role was expressly provided under the new s 369D of the CA 2016. The court also had a role post-approval of the scheme of arrangement under its inherent jurisdiction if 'consent to the scheme was obtained by fraud or where there are obvious mistakes in the documents setting out the scheme (see paras 54–56 & 58). B C D

(2) Tunai having voted in favour of Scheme E after being aware of a potential illegality issue could not now come to court to assert the same alleged illegality to set aside Scheme E. If Tunai relied on fraud to set aside Scheme E, it had to file a new suit and make all scheme creditors and the applicants here as defendants because all parties affected by a court order must be made parties to the suit. Further, allegation of a total failure of consideration was not a ground to set aside Scheme E. Therefore, issue (ii) was answered in the negative (see paras 65–66, 69 & 71). E F

(3) Under s 369D(1) of the CA 2016, the court had the power, upon application by a company or creditor bound by the approved scheme, to clarify any terms of such scheme. Under s 369D(2) of the CA 2016, where the court was satisfied that the scheme company had committed an act or omission, or made a decision, that resulted in a breach of any terms of the arrangement, the court may, on an application of any creditor bound by the arrangement confirm, reverse or modify the act, omission or decision of the company or give such direction or make such order as the court thought fit to rectify the act, omission or decision of the company. Thus, Tunai could not rely on s 369D of the CA 2016 as the grounds relied on by Tunai to set aside Scheme E did not come within its ambit (see paras 74–76). G H I

(4) Issue (iv) was answered in the positive. Tunai was estopped from setting aside Scheme E having failed to disclose the secret deal to the scheme creditors and the court when the court was asked to approve Scheme E (see paras 77 & 79).

[Bahasa Malaysia summary

Pencelah pertama yang dicadangkan iaitu Tunai Impian Enterprise Sdn Bhd ('Tunai') telah memfailkan tuntutan terhadap pemohon kedua iaitu Khee San Food Industries Sdn Bhd ('KSFI') sebanyak RM18,665,891.63 berdasarkan pelanggaran perjanjian pinjaman wang. Saman tersebut telah diselesaikan melalui perintah persetujuan. Pada tarikh kemudian, seorang pengurus kehakiman interim ('PKI') telah dilantik ke atas KSFI. Pelantikan PKI tersebut telah mencetuskan permohonan PN17 ke atas syarikat induk kumpulan tersebut, pemohon pertama iaitu Khee San Bhd ('KSB'). Untuk menyelesaikan status PN17 serta tanggungjawabnya kepada pemiutang kumpulan, KSB dan anak syarikatnya telah mencadangkan satu skim perkiraan di bawah s 366 Akta Syarikat 2016 ('AS 2016'). Walau bagaimanapun, skim perkiraan tersebut tidak menjadi kenyataan dan oleh itu, satu skim perkiraan kedua telah dicadangkan ('skim KSB'). Skim KSB terdiri daripada lima skim berbeza iaitu skim A hingga E yang saling bergantung antara satu sama lain. Di bawah Skim E, Tunai sebagai satu-satunya pemiutang telah mengundi untuk menyokongnya. Skim KSB telah diluluskan oleh mahkamah di bawah s 366(3) dan (4) AS 2016 ('perintah saksi'). Selepas itu, Tunai memohon untuk mengetepikan Skim E kerana berpendapat bahawa berlaku kegagalan pertimbangan yang berpunca daripada janji yang didakwa dibuat bagi pihak KSFI untuk menghormati perintah persetujuan jika Tunai mengundi memihak kepada Skim E ('perjanjian rahsia'). Tunai juga berpendapat bahawa pelaksanaan Skim E akan bertentangan dengan peraturan 10 Peraturan-Peraturan Pemberi Pinjam Wang (Kawalan dan Pelesenan) 2003 yang menjadikan Skim E batal dan/atau menyalahi undang-undang menurut s 24 Akta Kontrak 1950. Isu-isu untuk pertimbangan adalah: (a) sama ada mahkamah boleh mengetepikan perintah mahkamah terdahulu yang telah meluluskan skim perkiraan di bawah s 366(3) dan (4) AS 2016; (b) sama ada Tunai boleh mengetepikan perintah mahkamah; (c) sama ada Tunai boleh bergantung kepada s 369D AS 2016 untuk membatalkan perintah mahkamah; dan (d) sama ada Tunai yang telah mengundi untuk Skim E dan gagal mendedahkan perjanjian rahsia tersebut dihalang daripada mengetepikan Skim E.

Diputuskan, menolak permohonan:

(1) Mahkamah tidak mempunyai kuasa yang diberikan secara nyata kepada mereka di bawah s 366 AS 2016 untuk meminda atau menambah mana-mana terma baharu kepada skim perkiraan yang telah diluluskan oleh mahkamah di bawah s 366(3) dan (4) AS 2016 ('skim yang diluluskan'). Begitu juga, tidak sepatutnya ada kuasa tersirat di bawah undang-undang biasa atau Kaedah-Kaedah Mahkamah 2012 untuk meminda atau menambah sebarang terma baharu kepada skim yang diluluskan. Tambahan pula, skim yang diluluskan mesti mempunyai kemuktamadan. Pemiutang skim seperti pemiutang perdagangan dan

institusi kewangan mesti dapat bertindak berdasarkan terma-terma skim yang diluluskan tanpa bimbang bahawa terma tersebut mungkin diubah atau dipinda kemudian oleh mahkamah. Mahkamah mempunyai peranan yang terhad selepas meluluskan skim perkiraan di bawah s 366(3) dan (4) AS 2016. Peranan ini secara tegas disediakan di bawah s 369D AS 2016. Mahkamah juga mempunyai peranan selepas kelulusan skim perkiraan berdasarkan bidang kuasa sedia ada jika 'persetujuan terhadap skim diperoleh melalui penipuan atau jika terdapat kesilapan yang jelas dalam dokumen yang menyatakan skim' (lihat perenggan 54–56 & 58).

(2) Tunai yang telah mengundi menyokong Skim E selepas menyedari isu kemungkinan kesalahan undang-undang tidak boleh lagi datang ke mahkamah untuk mendakwa kesalahan undang-undang yang sama bagi mengetepikan Skim E. Jika Tunai bergantung kepada penipuan untuk mengetepikan Skim E, dia perlu memfailkan saman baharu dan menjadikan semua pemiutang skim dan pemohon di sini sebagai defendan kerana semua pihak yang terjejas oleh perintah mahkamah mesti dijadikan pihak dalam saman tersebut. Selain itu, dakwaan kegagalan pertimbangan sepenuhnya bukan merupakan sebab untuk mengetepikan Skim E. Oleh itu, isu (ii) dijawab secara negatif (lihat perenggan 65–66, 69 & 71).

(3) Di bawah s 369D(1) AS 2016, mahkamah mempunyai kuasa, atas permohonan oleh syarikat atau pemiutang yang terikat dengan skim yang diluluskan, untuk menjelaskan mana-mana terma skim tersebut. Di bawah s 369D(2) AS 2016, apabila mahkamah berpuas hati bahawa syarikat skim telah melakukan sesuatu tindakan atau peninggalan, atau membuat keputusan, yang menyebabkan pelanggaran mana-mana terma perkiraan, mahkamah boleh, berdasarkan permohonan mana-mana pemiutang yang terikat dengan perkiraan tersebut, mengesahkan, membalikkan atau meminda tindakan, kegagalan atau keputusan syarikat, atau memberi arahan atau membuat perintah yang mahkamah anggap sesuai untuk membetulkan tindakan, kegagalan atau keputusan syarikat. Oleh itu, Tunai tidak boleh bergantung kepada s 369D AS 2016 sebagai alasan untuk membatalkan Skim E kerana alasan-alasan yang digunakan Tunai tidak termasuk dalam skopnya (lihat perenggan 74–76).

(4) Isu (iv) dijawab secara positif. Tunai terhalang daripada mengetepikan Skim E kerana gagal mendedahkan perjanjian rahsia kepada pemiutang skim dan mahkamah apabila mahkamah diminta untuk meluluskan Skim E (lihat perenggan 77 & 79).]

Cases referred to

Atlassian Corp Pty Limited, Re [2013] FCA 1451, FC (refd)
Ausnet Services Ltd v CMR of Taxation [2024] FCA 90, FC (refd)
Awesome Broadcasting Sdn Bhd v MYTV Broadcasting Sdn Bhd [2024] 4 MLJ 564; [2024] 5 MLRA 8, CA (refd)
Boustead Trading (1985) Sdn Bhd v Arab-Malaysian Merchant Bank Bhd [1995] 3 MLJ 331, FC (refd)
Kamuja Corp Sdn Bhd v Aras Dimensi Sdn Bhd (dalam likuidasi) [2016] MLJU 659, HC (refd)
Kempe v Ambassador Insurance Co [1998] 1 WLR 271, PC (folld)
Merong Mahawangsa Sdn Bhd & Anor v Dato' Shazryl Eskay bin Abdullah [2015] 5 MLJ 619; [2015] 8 CLJ 212, FC (refd)
Saujana Resort (M) Bhd v Chin Cheen Foh & Ors and another appeal [2021] 3 MLJ 873; [2021] 3 CLJ 71, CA (refd)
Tetap Tiara Sdn Bhd v Pengurusan Perbadanan Jaya One & Ors and other appeals [2024] 2 MLJ 853; [2024] 1 AMR 499, CA (refd)
The Oriental Insurance Co Ltd v Reliance National Asia Re Pte Ltd [2008] SGCA 18, CA (refd)
Top Builders Capital Bhd & Ors v Seng Long Construction & Engineering Sdn Bhd & Ors [2023] MLJU 580, HC (refd)

Legislation referred to

Companies Act 1981 [BM]
Companies Act 2016 ss 366, 366(3), (4), 369D, 369D(1), (2)
Companies (Amendment) Act 2024
Contracts Act 1950 s 24
Moneylenders (Control and Licensing) Regulations 2003 reg 10
Moneylenders Act 1951
Rules of Court 2012 O 92 r 4

Tharminder Singh (with Joycelyn Goh and Aiman Danial) (Izral Partnership) for the applicants.
Kirubakaran K (with Daljit Singh and Tan Keng Yi) (Daljit Singh Partnership) for the first intervener.
Koh San Tee (with Niisha Lakshme and Tan Sze Ting) (Benjamin Dawson) for the second and third intervener.

Leong Wai Hong J:

INTRODUCTION

[1] Can a scheme creditor apply to court to set aside a scheme of arrangement which had been approved by the scheme creditors (including this scheme creditor), and approved by the court under s 366(3) and (4) of the Companies Act 2016 ('the CA 2016')?

[2] Can a scheme creditor apply to court to set aside a scheme of arrangement on the ground of a total failure of consideration because a secret deal he had agreed with the applicant of the scheme of arrangement to secure his favourable vote was not honoured by the applicant?

[3] Can this scheme creditor further argue that because this secret deal was not disclosed by him to the scheme creditors and to the court that approved the scheme, the approved scheme of arrangement is illegal and can be set aside on ground of illegality?

(See written submissions of first proposed intervener Tunai Impian Enterprise Sdn Bhd ('Tunai' or 'TIESB') in encl 51 paras 3,4 and 22.)

[4] The scheme creditor in question is Tunai.

[5] I heard counsel on 28 November 2024 and on 20 January 2025. On 20 January 2025, I dismissed Tunai's application for prayers 2 to 7 with costs. On costs, I ordered Tunai:

(a) to pay costs of RM20,000 to the applicants subject to allocatur; and

(b) pay costs of RM8,000 each to the second intervener and third intervener subject to allocatur.

[6] Tunai has appealed to the Court of Appeal on 14 February 2025. These are my grounds of judgment.

FACTS OF THE CASE

Parties

[7] The first applicant is Khee San Bhd ('first applicant' or 'KSB'). The second applicant is Khee San Food Industries Sdn Bhd ('second applicant' or 'KSFI').

[8] The third applicant is Khee San Marketing Sdn Bhd. The fourth applicant is Mega Global Confectionary Sdn Bhd.

[9] The first intervener is Tunai. The second intervener is HSBC Bank Malaysia Bhd ('HSBC'). The third intervener is ALLIANCE Bank Malaysia Bhd ('ABMB').

Tunai's secret deal with the applicants in particular the second applicant

[10] The facts revealing Tunai's secret deal with the applicants in particular the second applicant ('secret deal') is disclosed in Tunai's written submissions in encl 51 from paras 22 to 28.

[11] At this stage it is sufficient to set out a few relevant paras from encl 51 on the secret deal to expose Tunai's duplicity:

> FAILURE OF CONSIDERATION ISSUE
>
> 22. Further, we respectfully draw this Honourable Court's attention on how KSFI and/or the Applicants caused total failure of consideration, *which led to TIESB's intended withdrawal of its approval in Scheme E. Key facts are as follows:–*
>
> ...
>
> 24. However, it is our submission that *TIESB's support in Scheme E is strictly subject to KSFI's compliance and performance pursuant to the Consent Order.*
>
> 25. *We say this because KSFI has full knowledge or is deemed to have knowledge of the following:–*
>
> 25.1 *TIESB will never support the proposed Scheme of Arrangement;*
>
> 25.2 Since the Applicants obtained a Court's order to convene a creditors' meeting on 23.9.2023, TIESB was never interested to attend any of the meetings on 11.11.2022 and 25.11.2022;
>
> 25.3 The Applicants sought to hold an Adjourned Court Convened Creditors' Meeting on 9.12.2022;
>
> 25.4 *Only on 8.12.2022, one day prior to the Adjourned Court Convened Creditors' Meeting, TIESB had informed KSFI's solicitors* (at that time), Messrs Krish Maniam & Co that:–
>
> > *TIESB agreed to support Scheme E subject to and conditional upon KSFI and the white knight agreeing to honour the terms of the Consent Order* ...
>
> Refer: TIESB's solicitors' letter dated 8.12.2022, Enclosure 18, Exhibit 'CSW-10', pages 66–67.
>
> 25.5 Early in the morning before the Adjourned Court Convened Creditors' Meeting on 9.12.2022, KSFI had expressly acknowledged TIESB's condition and confirmed that:–
>
> (a) Messrs Norendra & Yap was appointed as the solicitors on record for the sales of the lands;
>
> (b) The sales of the lands will be formalised on 12.12.2022; and
>
> (c) KSFI will comply with the Consent Order.
>
> Refer: Messrs Krish Maniam & Co's email dated 9.12.2022, Enclosure 18, Exhibit 'CSW-11', pages 71–72.
>
> 25.6 *Relying on KSFI's assurance, TIESB supported the Scheme E on the same day on 9.12.2022 while anticipating the sale and purchase agreement to be executed by KSFI.*
>
> 26. KSFI is deemed to have notice of *TIESB's conditional support* to Scheme E, in that, *TIESB will only support Scheme E provided KSFI honours its obligations to execute*

the Sale and Purchase Agreement pursuant to Consent Order. …

…

30. Premised on KSFI's fundamental failure above, *we submit that TIESB is entitled to rescind the statutory contract and withdraw its support in Scheme E.* (Emphasis added.)

Non-disclosure to scheme creditors and to court of Tunai's secret deal and conditional support for Scheme E

[12] Tunai's secret deal and conditional support for Scheme E were not disclosed to the scheme creditors despite Tunai's knowledge that all five schemes A to E were inter-conditional. Tunai also failed to disclose this relevant fact to the court when the court was asked to approve all five schemes A to E that were inter-conditional.

Background facts which led to Tunai's secret deal

[13] The background facts which led to Tunai's secret deal are as follows:

(a) Tunai had filed a claim in Kuala Lumpur High Court Suit No WA-22NCC-387–08 of 2020 ('Suit No 387') against the second applicant, for a sum of RM18,665,891.63 premised on a breach of a moneylending agreement dated 13 March 2019 between them ('moneylending agreement') (see encl 16 p 29 at para 9);

(b) Suit No 387 was settled by a consent order dated 3 June 2021 (see encl 16 p 30 at para 10);

(c) the material terms of the consent order are as follows:

(i) the second applicant was required to sell seven plots of land to Tunai at RM40m;

(ii) the second applicant then was required to lease that land from Tunai for a period of two years for RM7.2m;

(iii) the second applicant's debt of RM18m was to be treated as part payment to purchase that land; and

(iv) leaving the balance purchase price of RM14.8m payable by Tunai.

[14] Sometime later in November 2021, an interim judicial manager was appointed over the second applicant. The interim judicial manager commenced Kuala Lumpur High Court Originating Summons No WA-24NCC-701–05 of 2022 to challenge, amongst others, the validity of the consent order and the moneylending agreement (see encl 16 at p 33 para 15.4.)

[15] This OS No 701 was discontinued on 4 July 2022 without liberty to file afresh.

[16] When opposing OS No 701, Tunai took the position (in affidavit affirmed by its director) 'that all legal issues that were raised and could have been raised' ie any illegality surrounding the moneylending agreement had been merged into the consent order (see Tunai's affidavit in encl 35 p 197 at para 17); and the interim judicial manager of the second applicant 'is estopped from reagitating the alleged illegality of the moneylending agreement ... as these issues ... had been merged into the consent judgment' (see Tunai's affidavit in encl 35 p 200 at para 21).

First scheme of arrangement

[17] Meanwhile, the appointment of the interim judicial manager over the second applicant had triggered the application of PN17 over its holding company, the first applicant. To resolve the PN17 status as well as its obligations to creditors of the group, the first applicant and its subsidiaries proposed a scheme of arrangement under s 366 of the CA 2016 (see encl 22/PDF: p 122/para 8–11).

[18] The first scheme of arrangement did not materialise (encl 22/ PDF: pp 122–126 para 8–24).

Second scheme of arrangement

[19] A second scheme of arrangement was then proposed by the applicants via Kuala Lumpur High Court Originating Summons No WA-24NCC-884–09 of 2022 ('KSB schemes').

[20] The KSB schemes consist of five different schemes or classification of creditors, namely schemes A, B, C, D and E as set out in the explanatory statement dated 7 October 2022 circulated to the scheme creditors ('ES') (Ssee encl 26 exh 'HSBC2').

[21] Scheme E together with Schemes A, B, C and D are inter-conditional upon each other pursuant to cl 16 of the ES (see cl 16 of the ES in encl 26 exh 'HSBC2' at p 67).

[22] All five schemes achieved the requisite statutory approval under s 366(3) of the CA 2016 through the acceptance by more than 75% of the total value of the scheme creditors present and voting at the court convened meetings and adjourned court convened meeting.

(See encl 26 exhibit 'HSBC2' at p 67.)

[23] HSBC and ABMB had attended the court convened meeting held on 31 October 2022 and voted in support of scheme D.

[24] Tunai is the only creditor under Scheme E and voted for it at the adjourned court convened meeting held on 9 December 2022. Scheme E consists of the following terms:

(a) Tunai shall waive 50% of the debt amount amounting to RM9.18m and all interests accruing after the cut-off date;

(b) the remaining 50% debt shall be converted into the settlement shares at the issue price ('settlement shares');

(c) Tunai shall discharge including uplifting the lien holders' caveats and to hand over the titles of the seven plots of industrial land with the second applicant's factory erected thereon, namely:

(i) GM 628 Lot 1819 in the Mukim and Daerah of Petaling;

(ii) GM 672 Lot 1820 in the Mukim and Daerah of Petaling;

(iii) GM 673 Lot 1821 in the Mukim and Daerah of Petaling;

(iv) GM 734 Lot 1822 in the Mukim and Daerah of Petaling;

(v) GM 735 Lot 1823 in the Mukim and Daerah of Petaling;

(vi) GM 736 Lot 1824 in the Mukim and Daerah of Petaling; and

(vii) GM 236 Lot 1832 in the Mukim and Daerah of Petaling.

(collectively 'the property') to the second applicant and free the second applicant from all actions, proceedings, claims, demands or guarantees whatsoever which Tunai has or can or may have against the second applicant for or in respect of the debt owing to Tunai upon receipt of the settlement shares.

(d) Tunai shall be prohibited from enforcing any orders or judgments obtained against the second applicant.

[25] The KSB schemes has been approved by the court on 21 December 2022 under s 366(3) and (4) of the CA 2016 ('sanction order') (see encl 26 exh 'HSBC5' pp 106–168).

[26] Tunai did not disclose in any of the court convened meetings and adjourned court convened meeting that Tunai's approval of Scheme E was conditional upon the second applicant's fulfilment of the terms of the consent order entered into between, inter alia, Tunai and the second applicant.

Tunai now attempts to set aside the KSB schemes of arrangement

[27] 15 months after the KSB Schemes had been approved by this court, Tunai now attempts to set aside Scheme E, which if allowed by me will result in the other four schemes being also set aside as they are inter-conditional.

[28] When the schemes are made inter-conditional, if any scheme does not become effective, the proposed restructure will not proceed (see *Re Atlassian Corp Pty Limited* [2013] FCA 1451 at para 12 and *Ausnet Services Ltd v CMR of Taxation* [2024] FCA 90 at para 97).

[29] The facts on Tunai's attempts to set aside Scheme E are as follows: firstly, Tunai commenced Kuala Lumpur High Court Originating Summons No WA-24NCC-371–07 of 2023 OS No 371 ('OS No 371') seeking to, inter alia, withdraw their vote in Scheme E alleging there was a failure of consideration and, consequently set aside the sanction order. The so-called failure of consideration arose from an alleged promise allegedly made on behalf of the second applicant to honour the consent order if Tunai votes in favour of Scheme E (see encl 19 pp 28–32).

[30] This OS No 371 was struck out with liberty to file afresh on 22 March 2024 as the High Court judge was of the view that His Lordship had no jurisdiction to set aside another High Court's order.

TUNAI FILED A NOTICE OF APPLICATION (ENCL 14)

[31] On 5 April 2024 Tunai filed a notice of application (encl 14) before me as the sanction order was granted in this OS. With the benefit of the submissions made in OS No 371, Tunai now also contends, inter alia, Scheme E contravenes the Moneylenders (Control and Licensing) Regulations 2003 ('the Moneylenders Regulations 2003').

[32] The reliefs sought by Tunai are:

(a) that leave be granted to Tunai to intervene and to be named as respondent in this proceeding;

(b) a declaration that Tunai's support for the approval on the scheme of arrangement (Scheme E) as set out by the first applicant in the explanatory statement dated 7 October 2022 as approved in the adjourned court convened meeting of creditor (Scheme E creditor) on 9 December 2022 is in contravention of reg 10 of the Moneylenders Regulations 2003 read together with the moneylending agreement dated 13 March 2019 entered between Tunai with the second applicant and thereby rendering Tunai's support unlawful;

(c) a declaration that the scheme of arrangement (Scheme E) is no longer binding on Tunai;

(d) consequentially, that the sanction in relation to scheme of arrangement (Scheme E) given pursuant to the order of this court dated 21 December 2022 be set aside/reversed;

(e) in the alternative, an order of this court to hold further court convened meeting of creditors on any date to be determined later for the purpose of re-vote by all scheme creditors and/or any further directions to be given as this honourable court may deem fit;

(f) costs; and

(g) such further or other relief as this honourable court may deem fit,

GROUNDS RELIED ON BY TUNAI TO SET ASIDE SCHEME E

[33] Tunai relies on these grounds to set aside Scheme E (see encl 14):

(a) the second applicant through its solicitors, Messrs Krish Maniam & Co, had entered into an agreement with Tunai prior to Tunai's adjourned court-convened meeting on 9 December 2022 whereby the second applicant and/or the white knight agreed to honour the terms of the consent order in consideration for the support of Tunai in Scheme E ('agreement');

(b) the second applicant and/or the white knight failed to disclose the agreement to the creditors in Scheme A to Scheme D;

(c) the second applicant and/or the white knight failed to comply with the consent order and the agreement, ie, failed to execute a sale and purchase agreement in respect of the sale of the second applicant's properties to Tunai and/or its nominees and thereby frustrating the agreement;

(d) the second applicant and/or the white knight then alleged that their solicitors ie, Messrs Krish Maniam & Co never had the capacity and/or authority to represent the second applicant and to enter into the agreement with Tunai;

(e) apart from the total failure of consideration in respect of the agreement, the execution of Scheme E would be in contravention of reg 10 of the Moneylenders Regulations 2003, read together with the moneylending agreement dated 13 March 2019 between Tunai and the second applicant and the Moneylenders Act 1951 rendering Scheme E void and/or illegal pursuant to s 24 of the Contracts Act 1950.

OBJECTION BY THE APPLICANTS

[34] The applicants oppose Tunai's application.

[35] They rely on the following grounds (set out in their written submissions encl No 53 at paras 2, 5 to 7 and 60 to 63), which I have rephrased below for clarity and cohesion:

(a) there is no jurisdiction to set aside or reverse the sanction order sanctioning all the applicants' schemes including Scheme E. All the schemes are inter-conditional;

(b) Tunai cannot rely on the new s 369D of the CA 2016;

(c) Tunai's application is tainted with illegality; and

(d) Tunai's application is also barred by the doctrines of merger, judicial estoppel and res judicata due to the consent order between, inter alia, Tunai and the second applicant in Suit No 387 (see encl 16 p 88).

OBJECTION BY HSBC AND ABMB

[36] Both HSBC and ABMB intervened in the OS to oppose Tunai's application. They are the judgment creditors of the first applicant and second applicant for monies due and owing under banking facilities granted by HSBC and ABMB to the second applicant and guaranteed by the first applicant.

[37] HSBC and ABMB are also scheme creditors under Scheme D along with other financial institution creditors whereas Tunai is the only creditor under Scheme E.

[38] HSBC and ABMB rely on the following grounds set out in their written submissions in encl No 47:

(a) Tunai is bound by the terms of the schemes of arrangements and cannot now seek to withdraw their support and set aside the sanction order granted by the court under s 366(3) and 366(4) of the CA 2016;

(b) the secret deal between Tunai and the applicants are illegal and thus Tunai's application is tainted with illegality;

(c) there is no contravention of the Moneylenders Regulations 2003;

(d) Tunai having voted in support of Scheme E and failing to raise any objection at the hearing of the applicants' application for court approval of the schemes is now estopped from setting aside the court sanction just because its secret deal was not honoured by the second applicant due to disputes; and

(e) Tunai's application is also barred by the doctrines of merger, judicial estoppel and res judicata due to the consent order between, inter alia, Tunai and the second applicant in Suit No 387.

ISSUES TO BE DETERMINED

[39] The issues arising for determination are as follows:

(a) whether a court can set aside an earlier court order which had approved a scheme of arrangement under s 366(3) and (4) of the CA 2016;

(b) whether Tunai can set aside the court order which had approved Scheme E under s 366(3) and (4) of the CA 2016;

(c) whether Tunai can rely on the new s 369D of the CA 2016 to set aside an earlier court order which had approved Scheme E under s 366(3) and (4) of the CA 2016; and

(d) whether Tunai having voted for Scheme E and failing to disclose the secret deal at the hearing of the applicants' application for court approval of the schemes is now estopped from setting aside Scheme E just because its secret deal was not honoured by the second applicant due to subsequent disputes.

Issue 1 — whether a court can set aside an earlier court order which had approved a scheme of arrangement under s 366(3) and (4) of the CA 2016

Applicants' submissions

[40] The applicants submit in encl 53 from paras 16 to 23:

16. There are 2 schools of thought in relation to Court's jurisdiction post a sanction order.

17. *The first school of thought is — the court cannot alter the substance of the scheme save in cases of obvious mistakes or fraud*. This approach was adopted by the English Privy Council in *Kempe v Ambassador Insurance Co* [1998] 1 WLR 271.

18. *The second school of thought is - a sanction order operates as an order of court. The Court may make any order subsequent to the sanction order under its inherent jurisdiction if the sanction order does not represent the true intention of the actual order or under the slip rule*. This approach was adopted by the Supreme Court of Australia (sic — it should be the Supreme Court of New South Wales) in *Re AGL Gas Networks Ltd* (2001) 37 ACSR 441.

19. Justice Ong Chee Kwan analysed both these schools of thought in *Top Builders Capital Bhd & Ors v Seng Long Construction & Engineering Sdn Bhd & Ors* [2023] MLJU 580 (High Court). His Lordship *preferred the English approach but subject to the added supervisory powers vested.*

A 20. The High Court in *Top Builders Capital Bhd & Ors v Seng Long Construction & Engineering Sdn Bhd & Ors* further observed that such supervisory powers do not confer jurisdiction to vary or set aside a scheme of arrangement but simply one to give effect to the scheme ...

B 21. Separately, in an earlier decision in *Tai See Yoon & Ors v NCT Tropika Sdn Bhd* [2022] MLJU 3438, Justice Zainal Azman dismissed an application to set aside a sanction order relying on the Federal Court's decisions in *Badiaddin bin Mohd Mahidin & Anor v Arab Malaysian Finance Bhd* [1998] 1 MLJ 393and *CIMB Investment Bank Bhd (previously known as Commerce International Merchant Bankers Bhd) v Metroplex Holdings Sdn Bhd* [2014] 6 MLJ 779 (without C citing the English and Australian approaches).

22. At this juncture, in the event this Court were to prefer the first school of thought, then, there is no jurisdiction to enable this Court to application in Enclosure 14 save in cases of obvious mistakes or fraud, which is not Tunai's pleaded case.

D 23. Similarly, if this Court were to prefer the second school of thought, there is neither justified reason put forth by Tunai for this Court to exercise its inherent jurisdiction nor any basis for slip rule to be applied here. (Emphasis added.)

E Tunai's submissions

[41] Tunai contends the court has the power to make further alterations even after granting of the sanction order, taking into consideration the interest of the creditors.

F

[42] Tunai cites s 366(3) and (4) of the CA 2016, the inherent jurisdiction of the court under O 92 r 4 of the Rules of Court 2012 and *Top Builders Capital Bhd & Ors v Seng Long Construction & Engineering Sdn Bhd & Ors* [2023] MLJU 580 (*Top Builders Capital*), where the High Court said:

G (44) To my mind, the fact that *s 366(4) stipulates that the court may grant its approval to a compromise or arrangement 'subject to such alterations or conditions as it thinks just' does not necessarily mean that the court has no powers to make further 'alterations or conditions as it thinks just after granting its approval at all*. Indeed, s 366(4) did not express any such limitations. On the contrary, it is my judgment that s 366(4) H *confers on the court an overarching supervisory power over the scheme throughout from the moment an application is placed before the court until the completion of the implementation of the scheme*. Such supervisory power is necessary and is consistent with the court's aforesaid stated roles. (Emphasis added.)

I Submissions from HSBC and ABMB

[43] HSBC and ABMB contend that:

TIESB Is Bound By The Terms Of The KSB Schemes And Cannot Seek To Withdraw Their Support And Set Aside The Sanction Order

22. It is trite that once the Court gives its approval to a scheme, the scheme is binding on all the parties to the scheme, including the dissenters. Please see Section 366(3) of the CA 2016.

23. We refer to *The Oriental Insurance Co Ltd v Reliance National Asia Re Pte Ltd* [2008] SGCA 18 at p 157 ... where the Singapore Court of Appeal held as follows:

> 44. Secondly, once the court gives its approval to a scheme, the scheme is binding on all parties to the scheme, and *the scheme cannot afterwards be altered, even if the shareholders and the creditors of the company acquiesce in the alteration ...*
>
> 45. Nevertheless, the *court retains an inherent jurisdiction to amend or set aside a scheme in limited circumstances, for instance, if consent to the scheme was obtained by fraud or where there are obvious mistakes in the documents setting out the scheme.* It is also possible for a subsisting scheme of arrangement to be amended by another scheme approved by the court ...
>
> 46. Thirdly, in line with the first two principles stated above, *a creditor or member 'should raise his objections at the hearing for court sanction and not any later'* (see Walter Woon at para 16.18; see also *Eltraco* and *Chew Eu Hock*). As explained in *Chew Eu Hock*, *the rationale for this principle is that any late objections after a scheme of arrangement has been approved by the court would be 'unfair, unreasonable and prejudicial' to the other parties to the scheme, and (more importantly) there is a need to ensure that there is certainty as to the validity of a court-approved scheme* ...

24. In *Kamuja Corp Sdn Bhd v Aras Dimensi Sdn Bhd (dalam likuidasi)* [2016] MLJU 659 at p 203–204 ... Mohd Nazlan JC (as he then was) held that the purchasers who elected not to participate in the scheme in return for the sum invested, were estopped from challenging the application to sanction the scheme. His Lordship had this to say:

> (33) The implications of *the finality and binding nature of the Scheme cannot be emphasized enough*. For instance, MBSB had relied on the sanction of the Court to disburse its new loan for the Scheme. Otherwise, certainty and stability in trade and commerce would be adversely affected, and it would not be inaccurate to say that *it would be practically difficult for financial institutions to structure their business affairs if a binding Order of the Court cannot be relied on and is open to challenge in subsequent proceedings.* It is additionally wasteful and constitutes an unfair financial burden on the Respondent which is already in liquidation to be put through a lengthy litigation process, in view of the fact that the Scheme has specified the recourse for the applicants, following from their own decision not to support the Scheme, to obtain a refund of their SPA purchase sums as Non-participating Purchasers.

25. A fortiori in the case of TIESB, who had voted in support of Scheme E, cannot now seek to set aside the Sanction Order on the ground that one of the Applicants, KSFI, had reneged on the purported side arrangement entered into secretly between TIESB and KSFI (if any).

26. To allow TIESB to do so would be unfair, unreasonable and prejudicial to HSBC, ABMB and other scheme creditors, and goes against the need of ensuring that there is certainty as to the validity of a court-sanctioned scheme, particularly when the Applicants have successfully obtained Bursa Malaysia's approval of the KSB Schemes on 19.8.2024.

27. TIESB is also estopped and cannot seek to enforce the terms of the Consent Order against KSFI, which clearly has been superseded by the TIESB's approval of Scheme E, and the sanctioning of the KSB Schemes by this Honourable Court. (Emphasis added.)

Court's analysis

[44] Issue (1) raises the question whether a court can set aside an earlier court order which had approved a scheme of arrangement under s 366(3) and (4) of the CA 2016.

CA 2016

[45] The relevant section on this issue is s 366 of the CA 2016 which reads as follows:

366 Power of Court to order compromise or arrangement with creditors and members

(1) The Court may, on an application under this Subdivision, order a meeting in a summary way to be summoned in such manner as the Court directs, by either—

(a) the company;

(b) any creditor or member of the company;

(c) the liquidator, if the company is being wound up; or

(d) the judicial manager, if the company is under judicial management.

(2) A meeting held pursuant to an order of the Court made under subsection (1) may be adjourned if the resolution for adjournment is approved by seventy-five per centum of the total value of creditors or class of creditors or the members or class of members present and voting either in person or by proxy at the meeting.

(3) The compromise or arrangement shall be binding on—

(a) all the creditors or class of creditors;

(b) the members or class of members;

(c) the company; or

(d) the liquidator and contributories, if the company is being wound up,

if the compromise or arrangement is agreed by a majority of seventy-five per centum of the total value of the creditors or class of creditors or members or class of members present and voting either in person or by proxy at the meeting or the adjourned meeting *and has been approved by order of the Court.*

(4) *The Court may grant its approval to a compromise or arrangement subject to such alterations or conditions as the Court thinks just.*

(5) An order under subsection (3) shall have no effect until an office copy of the order is lodged with the Registrar, and upon being so lodged, the order shall take effect on and from the date of lodgement or such earlier date as the Court may determine and as may be specified in the order. (Emphasis added.)

General observation

[46] I begin my making a general observation. Our s 366 of the CA 2016 uses the phrase 'approved by order of the Court' unlike say the Bermuda Companies Act 1981 which uses the phrase 'if sanctioned by the court'. Therefore, in the context of our scheme it is more accurate to use the phrase 'approved by order of the Court' rather than 'if sanctioned by the court'. The verb to use is 'approved' and not 'sanctioned' though their meanings may be the same.

Law in various jurisdictions

[47] Issue (1) has different answers in various jurisdictions. There is a useful survey of the case law from the courts in England, Singapore and India in the 2023 High Court judgment in *Top Builders Capital* and by the Singapore Court of Appeal in *The Oriental Insurance Co Ltd v Reliance National Asia Re Pte Ltd* [2008] SGCA 18 ('The Oriental Insurance Co Ltd').

[48] In *Kempe v Ambassador Insurance Co* [1998] 1 WLR 271 ('Kempe'), the Privy Council held that a time limit fixed under a scheme of arrangement to do an act that had been sanctioned by court cannot be extended by a court upon an application to extend time by a creditor who had failed to meet the deadline.

[49] The rationale given by Lord Hoffmann was that the terms of a scheme were agreed by the creditors and the court 'in giving its sanction ... has an inherent jurisdiction to correct any obvious mistakes in the document which sets out the scheme. (But) it cannot alter the substance of the scheme and impose upon the creditors an arrangement to which they did not agree ... to extend time ... would have been a material alteration' (see p 276 E-G).

[50] The Singapore Court of Appeal in *The Oriental Insurance Co Ltd* called

A the approach adopted in *Kempe* 'the English approach' (see grounds of judgment (48)).

[51] Some Australian courts disagreed with the view expressed in *Kempe*. The Singapore Court of Appeal in *The Oriental Insurance Co Ltd* called the approach adopted by these Australian courts 'the Australian approach'. VK Rajah JA when indicating his preference for the Australian approach said:

> The Australian approach
>
> 53 Contrary to the approach taken by the Privy Council in *Kempe* ((21) supra), the Australian courts have consistently taken the position that once a scheme of arrangement is approved by the court, it becomes an order of court, and thus, the statutory provisions on civil procedure (the Rules of Court, in our local context) permit the court to grant an extension of time for, inter alia, a creditor to file its proof of debt.
>
> ...
>
> 69 We note that the Judge did not take the view that the Australian approach was wrong; rather, she decided that 'the English position (was) more persuasive' (see the GD at (32)). *The question of whether the court has jurisdiction to extend time in respect of a court-approved scheme is essentially a question of discretion*, and invariably requires a judge to take a considered view on what best accords with the need for commercial certainty and fairness in this area of the law. *The Judge was unduly concerned with the overarching need for clarity, certainty and finality* (all of which are crucial to the efficacious implementation of schemes of arrangement), and thus mistakenly concluded that anything less than the strict English approach would be undesirable. However, as we have shown, *there are real practical conundrums with the strict English approach, and the reasoning in Kempe is, with respect, sharply flawed.* On the other hand, adopting the Australian approach does not necessarily entail sacrificing clarity, certainty and finality. In fact, the Australian approach mitigates some of the injustice that may potentially result under the English approach. It also gives due consideration to the established principles relating to schemes of arrangement while meeting, at the same time, the objectives of the legislative framework governing such schemes. *We have therefore adopted the Australian approach* as according with both the underlying policy and the objectives of s 210 of the Companies Act. (Emphasis added.)

[52] Justice Ong Chee Kwan analysed both schools of thought, *Kempe* and *The Oriental Insurance Co Ltd* in *Top Builders Capital.* His Lordship preferred the approach taken in *Kempe* but added that the court has an overarching supervisory power over the scheme throughout from the moment an application is placed before the court until the completion of the implementation of the scheme. This is what His Lordship said:

> (44) To my mind, the fact that *s 366(4) stipulates that the court may grant its approval to a compromise or arrangement 'subject to such alterations or conditions as it thinks just' does not necessarily mean that the court has no powers to make further alterations or*

conditions as it thinks just after granting its approval at all. Indeed, s 366(4) did not express any such limitations. On the contrary, it is my judgment that s 366(4) *confers on the court an overarching supervisory power over the scheme throughout from the moment an application is placed before the court until the completion of the implementation of the scheme*. Such supervisory power is necessary and is consistent with the court's aforesaid stated roles. (Emphasis added.)

Which approach should prevail in Malaysia?

[53] To my mind, with respect I am of the view *Kempe* sets out the correct jurisprudence when it comes to the powers of the court to entertain an application by the applicant to the scheme of arrangement or by the scheme creditors for changes to the terms of the scheme of arrangement that had been approved by the court under s 366 of the CA 2016.

[54] The court has no power expressly granted to it under s 366 to amend or add any new terms to a scheme of arrangement that had been approved by the court under s 366(3) and (4) of the CA 2016.

[55] Likewise, there should be no implied power under common law or the Rules of Court 2012 to amend or add any new terms to a scheme of arrangement that had been approved by the court under s 366(3) and (4) of the CA 2016. This is because the court cannot alter the substance of the scheme and impose upon the scheme creditors an arrangement to which they had not agreed to in the first place.

[56] A further reason for this approach is that a scheme of arrangement that had been approved by the court must have finality. Scheme creditors like trade creditors and financial institutions must be able to act on the terms of a scheme of arrangement without fear that the terms may be varied or altered subsequently by the court.

[57] These policy considerations have been articulated in *Kamuja Corp Sdn Bhd v Aras Dimensi Sdn Bhd (dalam likuidasi)* [2016] MLJU 659 by Mohd Nazlan JC who held that the purchasers who elected not to participate in the scheme in return for the sum invested, were estopped from challenging the application to sanction the scheme. His Lordship had this to say:

[33] The implications of *the finality and binding nature of the scheme cannot be emphasised enough*. For instance, MBSB had relied on the sanction of the court to disburse its new loan for the scheme. Otherwise, certainty and stability in trade and commerce would be adversely affected, and it would not be inaccurate to say that *it would be practically difficult for financial institutions to structure their business affairs if a binding order of the court cannot be relied on and is open to challenge in subsequent proceedings* ... (Emphasis added.)

[58] In my view, the court has a limited role after approving a scheme of arrangement under s 366(3) and (4) of the CA 2016. This role is expressly provided under the new s 369D of the CA 2016. The court also has a role post-approval of the scheme of arrangement under its inherent jurisdiction if 'consent to the scheme was obtained by fraud or where there are obvious mistakes in the documents setting out the scheme' (see *The Oriental Insurance Co Ltd*). This role would fall within the supervisory power stated in *Top Builders Capital.*

Issue 2 — whether Tunai can set aside the court order which had approved Scheme E under s 366(3) and (4) of the CA 2016

[59] Tunai relies on two grounds as set out in its written submissions in encl 51 at para 3:

> 3.1 The implementation of Scheme E of the Scheme of Arrangement would contravene the existing Regulation 10 of the Moneylenders (Control and Licensing) Regulations 2003 PU(A) 400/2003 ('the Illegality Issue'); and
>
> 3.2 KSFI has failed to provide fundamental consideration for TIESB's support in the Scheme of Arrangement, particularly Scheme E ('Failure of consideration Issue').

[60] As answered in issue (1) above, the court can only set aside Scheme E if consent to the scheme was obtained by fraud or where there are obvious mistakes in the documents setting out Scheme E.

[61] There are no obvious mistakes in the documents setting out Scheme E. That leaves us with the question — was consent to Scheme E obtained by fraud?

The illegality issue

[62] Tunai contends in its written submissions in encl 51 at para 16:

> 16. We respectfully submit that:
>
> 16.1 *At all material times, no parties had ever brought up this issue because none of the parties were aware of this incoming contravention with the Regulations* if Scheme E is executed;
>
> 16.2 The Scheme of Arrangement including Scheme E was examined/approved, and later sanctioned by this Honourable Court;
>
> 16.3 *The contravention of the Regulations was only discovered by TIESB's solicitors at later stage after the sanction order granted on 21.12.2022;* and
>
> 16.4 *TIESB and its solicitors are bound to notify this Honourable Court of the illegality discovered in Scheme E.* (Emphasis added.)

[63] With respect to counsel, I find the submissions 'At all material times, no parties had ever brought up this issue because none of the parties were aware of this incoming contravention with the Regulations' inaccurate for these reasons:

(a) counsel contends the illegality was 'only discovered by TIESB's solicitors at later stage after the sanction order granted on 21.12.2022', when in fact TIESB and its solicitors were already aware during proceedings in OS No 701 (from November 2021-July 2022) of the alleged illegality concerning the moneylending agreement (see encl 53 at para 8); and

(b) when opposing OS No 701, Tunai took the position (in affidavit affirmed by its director) 'that all legal issues that were raised and could have been raised' ie any illegality surrounding the moneylending agreement had been merged into the consent order (see affidavit in encl 35 p 197 at para 17); and the interim judicial manager of the second applicant 'is estopped from reagitating the alleged illegality of the moneylending agreement ... as these issues ... had been merged into the consent judgment' (see Tunai's affidavit in encl 35 p 200 at para 21).

[64] It is trite law that the court will not assist any party who is privy to illegality (see *Merong Mahawangsa Sdn Bhd & Anor v Dato' Shazryl Eskay bin Abdullah* [2015] 5 MLJ 619; [2015] 8 CLJ 212 (FC)).

[65] Tunai having voted in favour of Scheme E after being aware of a potential illegality issue cannot now come to court to assert the same alleged illegality to set aside Scheme E. It is trite that the court will not condone or lend its hand to a party who takes advantage of its own wrongdoings and comes to court without clean hands (see *Tetap Tiara Sdn Bhd v Pengurusan Perbadanan Jaya One & Ors and other appeals* [2024] 2 MLJ 853; [2024] 1 AMR 499 (CA) at (47) ('Tetap Tiara Sdn Bhd').

Procedural point — all parties affected by a court order must be made parties

[66] I am further of the view that if Tunai relies on fraud to set aside Scheme E, it has to file a new suit and make all scheme creditors and the applicants here as defendants. This is because all parties affected by a court order must be made parties to the suit.

(See *Saujana Resort (M) Bhd v Chin Cheen Foh & Ors and another appeal* [2021] 3 MLJ 873; [2021] 3 CLJ 71 (CA) (*Saujana Resort*) and *Awesome Broadcasting Sdn Bhd v MYTV Broadcasting Sdn Bhd* [2024] 4 MLJ 564; [2024] 5 MLRA 8 (CA).)

[67] In *Saujana Resort,* Vazeer Alam Mydin Meera JCA held at (41):

> ... It is trite that in an application for declaration, all parties who would potentially be affected by such an order must be before the court. An action for a declaration is an important device for ascertaining and determining the rights of parties. And it is settled that when a declaratory order is sought, all interested parties must be before the court. See dicta of Viscount Maugham in *London Passenger Transport Board v Moscrop* (1942) AC 332 at 345 (HL) ...

Failure of consideration issue

[68] Tunai contends the second applicant and/or the white knight agreed to honour the terms of the consent order in consideration for Tunai agreeing to vote for Scheme E. Tunai further contends the second applicant and/or the white knight failed to honour the terms of the consent order thereby resulting in a total failure of consideration.

[69] Based on my answer to issue 1, allegation of a total failure of consideration is not a ground to set aside Scheme E.

[70] Tunai's recourse, if there is indeed such a breach by the second applicant and/or the white knight, is to sue the second applicant and/or the white knight for failure to honour the terms of the consent order. For the record, I have not considered the merits of this allegation of Tunai as this is for the court hearing such a claim to decide.

[71] For the reasons above, I therefore answer issue 2 in the negative.

Issue 3 — whether Tunai can rely on the new s 369D of the CA 2016 to set aside an earlier court order which had approved Scheme E under s 366(3) and (4) of the CA 2016

[72] Section 369D was introduced by the Companies (Amendment) Act 2024 (Act A1701/2024), which took effect on 1 April 2024. Act A1701/2024 made substantial changes that, in the words of the Companies Commission of Malaysia in a press release issued on 13 October 2023, 'aims to introduce provisions to accord a more comprehensive framework at par with international practices to ensure that scheme of arrangements and compromise could be used as a more effective rehabilitation tool for companies facing financial difficulties'.

[73] Section 369D of the CA 2016 reads as follows:

> 369D Power of Court to review act, omission or decision, etc., after approval, etc, of compromise or arrangement

(1) The Court may, on an application of any company or creditor bound by a compromise or arrangement which has been approved by the Court under subsection 366(4) or subsection 369C(1), clarify any terms of the compromise or arrangement.

(2) Where the Court is satisfied that the company has committed an act or omission, or made a decision, that results in a breach of any terms of the compromise or arrangement, the Court may, on an application of any creditor bound by the compromise or arrangement —

(a) confirm, reverse or modify the act, omission or decision of the company; or

(b) give such direction or make such order as the Court thinks fit to rectify the act, omission or decision of the company.

(3) No clarification or order made, and no direction given, by the Court under subsection (1) or (2) may alter or affect any person's rights under the terms of the compromise or arrangement.
(Ins by Act A1701/2024)

[74] Under s 369D(1), the court has the power, upon application by a company or creditor bound by the scheme of arrangement approved by the court under s 366(4), to clarify any terms of such scheme.

[75] Under s 369D(2), where the court is satisfied that the scheme company has committed an act or omission, or made a decision, that results in a breach of any terms of the arrangement, the court may, on an application of any creditor bound by the arrangement confirm, reverse or modify the act, omission or decision of the company or give such direction or make such order as the court thinks fit to rectify the act, omission or decision of the company.

[76] Thus, Tunai cannot rely on s 369D of the CA 2016 as the grounds rely on by Tunai to set aside Scheme E do not come within its ambit.

Issue 4 — whether Tunai having voted for Scheme E and failing to disclose the secret deal at the hearing of the applicants' application for court approval of the schemes is now estopped from setting aside scheme e just because its secret deal was not honoured by the second applicant due to subsequent disputes

[77] I answer issue 4 in the positive. Tunai is estopped from setting aside Scheme E having failed to disclose the secret deal to the scheme creditors and disclose to the court the secret deal when the court was asked to grant the sanction order.

[78] The Federal Court in *Boustead Trading (1985) Sdn Bhd v Arab-Malaysian Merchant Bank Bhd* [1995] 3 MLJ 331 (FC) said:

A

> We take this opportunity to declare that the detriment element does not form part of the doctrine of estoppel. In other words, it is not an essential ingredient requiring proof before the doctrine may be invoked. *All that need be shown is that in the particular circumstances of a case, it would be unjust to permit the representor or encourager to insist upon his strict legal rights. In the resolution of this issue, a judicial arbiter would, when making his assessment of where the justice of the case lies, be entitled to have regard to the conduct of the litigant raising the estoppel*. This may, but need not in all cases, include the determination of the question as to whether the particular litigant had altered his position, although such alteration need not be to his detriment. (Emphasis added.)

B

C

[79] Tunai is estopped as it had hidden the secret deal from the court when the court was asked to approve Scheme E. It is trite that the court will not condone or lend its hand to a party who takes advantage of its own wrongdoings and comes to court without clean hands (see *Tetap Tiara Sdn Bhd* at (47)).

D

DECISION

[80] For the reasons above, I dismiss Tunai's application for prayers 2 to 7 with costs. On costs, I order Tunai:

E

(a) to pay costs of RM20,000 to the applicants subject to allocatur; and

(b) pay costs of RM 8,000 each to the second intervener and third intervener subject to allocatur.

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Lastly, I thank counsel for their helpful submissions which have greatly assisted me.

Application dismissed.

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Reported by Nabilah Syahida Abdullah Salleh

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